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Arthur Anderson & Co v Interfood Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEALS NO B–02–633 OF 2001 AND B–02–634 OF 2001

RICHARD MALANJUM, HASHIM YUSOFF AND TENGKU BAHARUDIN SHAH JJCA

B

24 JANUARY 2005

Civil Procedure —Anton Piller order — Application to set aside — Applicable guidelines in granting order — Whether failure to observe O 29 of Rules of the High Court 1980 — Whether order should be set aside

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The respondent had applied and on 9 March 1999 was granted several interim reliefs against the appellant, mainly an *Anton Piller* order ('the Order'). The appellant then applied to set aside the Order while the respondent sought an order to continue to retain the documents seized pursuant to the Order. The same High Court judge who granted the Order (1) allowed the respondent's application to retain the documents; but (2) dismissed the appellant's application to set aside the Order. The appellant appealed against both orders.

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The issues were, inter alia: (1) whether the High Court judge was correct in his approach when he only dealt with the grounds as he found them in the application to set aside the order and ignoring any other grounds that could have been found in the supporting affidavit; (2) whether the High Court judge was justified in granting the Order at the ex-parte stage; and (3) whether there were guidelines applicable in Malaysia on the mandatory contents as well as in the execution of an *Anton Piller* order.

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Held, allowing both appeals:

(1) The learned High Court judge had erred in that there was nothing in law to preclude him from perusing the supporting affidavit in order to consider any other grounds advanced to justify the reliefs sought for in the application. In doing what he did, the learned High Court judge went over-board on technicalities without due consideration to the salutary notion that courts exist to do justice (see para 15).

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(2) Even with the absence of any Practice Direction, the application and execution of an *Anton Piller* order is subject to stringent requirements, guidelines and safeguards. In other words any departure would be contrary to the common law of Malaysia as such point has already been well established (see para 26).

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(3) On evidence, there was a total failure by the respondent to observe the minimum requirements as to the contents and the execution of the said Order which elements the learned High Court judge failed to address.

On this ground alone that the court had no hesitation to set aside the Order (see para 29).

(4) The respondent failed to address another factor at the ex-parte stage, namely, on the serious consequence to it if its application was refused. There was nothing in the supporting affidavit or in any of the other affidavits filed on behalf of the respondent which expressed such apprehension (see para 37).

(5) The failure of the respondent for not disclosing the discovery order in an earlier suit tantamount to a failure to make a full and frank disclosure of relevant fact at the ex parte stage stage (see para 42).

(6) There were blatant failures to observe the provisions of O 29 Rules of the High Court 1980, ie (i) there was nothing stated in the supporting affidavit that the appellant was given notice of the intended application or the reason for not doing so; and (ii) there was no statement or reasonas to the nature of the urgency justifying the application be made exparte. The court, thus had no choice but to set aside the said Order (see paras 47 and 48).

[**Bahasa Malaysia summary**

Responden telah memohon dan pada 9 Mac 1999 telah diberi beberapa relif interim terhadap perayu, terutamanya satu perintah *Anton Piller* ('Perintah tersebut'). Perayu kemudiannya telah memohon untuk mengetepikan Perintah tersebut manakala responden pula memohon satu perintah untuk terus menyimpan dokumen-dokumen yang diambil berikutan dengan Perintah tersebut. Hakim Mahkamah Tinggi yang sama yang telah memberikan Perintah tersebut (1) membenarkan permohonan responden untuk menyimpan dokumen-dokumen; tetapi (2) menolak permohonan perayu untu mengetepikan Perintah tersebut. Perayu telah membuat rayuan terhadap kedua-dua perintah.

Isu-isu adalah, inter alia: (1) sama ada hakim Mahkamah Tinggi betul dalam pendekatannya apabila beliau hanya berurusan dengan alasan-alasan yang didapatinya di dalam permohonan untuk mengetepikan perintah tersebut dan mengabaikan alasan lain yang boleh didapati di dalam afidavit sokongan; (2)sama ada mahkamah tinggi mempunyai justifikasi membenarkan Perintah tersebut di peringkat ex-parte; dan (3) sama ada terdapat garis panduan yang terpakai di Malaysia untuk kandungan mandatori dan juga pelaksanaan perintah *Anton Piller*.

Diputuskan, membenar kedua-dua rayuan:

(1) Hakim Mahkamah Tinggi telah tersilap kerana tiada terdapat sebarang undang-undang yang mengecualikan beliau dari membaca afidavit sokongan bagi menimbang mana-mana alasan lain yang dikemukakan

untuk memberi justifikasi bagi relif yang dipohon di dalam permohonan itu. Dengan bertindak sebagaimana yang beliau lakukan, yang arif hakim mahkamah tinggi telah terlebih pada keteknikan tanpa memberi pertimbangan yang sewajarnya kepada kewujudan mahkamah iaitu untuk memberi keadilan (lihat perenggan 15).

(2) Walaupun tiada terdapat sebarang Arahan Amalan, permohonan dan pelaksanaan perintah Anton Piller adalah tertakluk kepada keperluan-keperluan dan garis panduan yang ketat. Dalam lain perkataan, sebarang penyimpangan adalah bercanggah dengan common law di Malaysia kerana perkara ini telah lama mantap (lihat perenggan 26).

(3) Pada keterangan, terdapat kegagalan mutlak oleh responden dalam mematuhi keperluan-keperluan minimum berhubung dengan kandungan dan pelaksanaan Perintah tersebut yang mana ianya tidak diteliti oleh yang arif hakim mahkamah tinggi. Alasan ini secara sendirinya sudah cukup bagi mahkamah untuk mengetepikan Perintah tersebut (lihat perenggan 29).

(4) Responden telah gagal untuk menunjukkan faktor lain pada peringkat ex-parte, iaitu akibat yang serius jika permohonan ini ditolak. Tidak terdapat apa-apa di dalam afidavit sokongan atau di dalam mana-mana afidavit yang difailkan oleh responden yang menunjukkan kerisauan ini (lihat perenggan 37).

(5) Kegagalan responden kerana tidak memberitahu tentang perintah penzahiran dalam guaman yang terdahulu adalah merupakan satu kegagalan untuk membuat pendedahan yang penuh dan tulus berhubung fakta relevan pada peringkat ex parte (lihat perenggan 42).

(6) Terdapat kegagalan yang ketara dalam mematuhi peruntukan-peruntukan A O 29 Kaedah-Kaedah Mahkamah Tinggi, iaitu: (i) tiada pernyataan didalam afidavit sokongan yang bahawa perayu telah memberi notis berkenaan dengan permohonan ini atau sebab-sebab tidak berbuat demikian; dan (ii) tidak terdapat pernyataan atau sebab berhubung dengan jenis kesegeraan yang memberi justifikasi permohonan ini dibuat secara ex parte. Mahkamah dengan itu tidak mempunyai pilihan lain tetapi mengetepikan Perintah tersebut (lihat perenggan 47 dan 48).]

Notes

For cases on application to set aside an *Anton Piller* order, see 2(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 554–555.

Cases referred to

Anton Piller KG v Manufacturing Processes Ltd [1976] Ch 55; [1976] 1 All ER 779 (refd)

Aspatra Sdn Bhd v Bank Bumiputra Malaysia Bhd & Anor [1987] 1 MLJ 97 (refd)
Bakmawar Sdn Bhd v Malayan Banking Bhd [1992] 1 MLJ 67 (refd)
Bank Mellat v Nikpour [1985] FSR 87 (refd)
Bintulu Adhesive & Chemicals Sdn Bhd v Chuah Seah Joo Plywood (Sarawak) Sdn Bhd [2000] MLJU 711 (refd)
Computerland Corp v Yew Seng Computers Pte Ltd [1991] 3 MLJ 201 (refd)
Dormeuil Freres SA & Anor v Nicolian International (Textiles) Ltd [1988] 3 All ER 197; [1988] 1 WLR 1362 (refd)
Evans v Bartlam [1937] AC 473 (refd)
HMO Pacific Sdn Bhd v Dr Johari b Muhamad Yusup [1997] MLJU 286 (refd)
See *Larut Consolidated Bhd & Anor v Khoo Ee Bee & Ors* [1997] 5 MLJ 77 (refd)
Lian Keow Sdn Bhd v C Paramiothi & Anor [1982] 1 MLJ 217 (refd)
Makonka Electronic Sdn Bhd v Electrical Industry Workers' Union &Ors [1997] MLJU 93 (refd)
Megat Naimuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd [2002] 1 MLJ 385 (refd)
Motor Sports International Ltd (Servants or Agents at Federal Territory of Labuan) & Ors v Delcont (M) Sdn Bhd [1996] 2 MLJ 605 (refd)
President Hotel Sdn Bhd v Dato Bandar Kuala Lumpur & Anor (75) MD 1 (refd)
Ratnam v Cumarasamv & Anor [1965] 1 MLJ 228 (refd)
Siporex Trade SA v Condel Commodities Ltd [1986] 2 ILR 428 (refd)
Tan Guan Eng & Anor v Ng Kweng Hee & Ors [1992] 1 MLJ 487 (refd)
UMW (Sarawak) Sdn Bhd v Kim Leong Timber Sdn Bhd & Ors [1989] 3 MLJ 177 (refd)
Universal Thermosensors Ltd v. Hibben [1992] 1 WLR 840 (refd)
Yousif v Salama [1980] 3 All ER 405 (not folld)
Zainal Abidin bin Haii Abdul Rahman v Century Hotel Sdn Bhd [1982] 1 MLJ 260 (refd)

Legislation referred to

Rules of the High Court 1980 O 1A, O 29 r 1(2A)(a), (b), (c), (d), (e), (f), (g), 2 Court of Judicature Act 1964

Appeal from: Civil Suits No MT3–22–137 of 1999 and MT3–22–137 of 1999 (High Court, Shah Alam).

Cecil Abraham (N Segaran with him) (Shearn Delamore & Co) for the appellant.
Gideon Tan (Lee Noushi with him) (Gideon Tan Razali Zaini) for the respondent.

Richard Malanjum JCA (delivering judgment of the court):

INTRODUCTION

[1] There were two appeals before us involving the same parties.

[2] Both appeals were heard simultaneously at the request of the appellant and consented to by the respondent.

[3] The first appeal was against the decision of the learned High Court judge in allowing the application by the respondent (encl 10) to retain the documents obtained pursuant to the Order of 9 March 1999 while the second appeal was against the decision of the same learned High Court judge in dismissing with costs the application by the appellant (encl 7) to set aside the Order dated 9 March 1999 ('the said Order') made on ex-parte application by the respondent.

[4] After hearing submissions of learned counsel for the parties we deferred our decisions. And on 12 February 2004 by way of oral judgment we allowed both the appeals. The respondent has applied for leave to appeal to the Federal Court. We therefore now state the reasons for our decisions.

BRIEF BACKGROUND

[5] On 12 February 1999 the respondent filed a suit against the appellant and one other which was not involved in these appeals, alleging negligence on the part of the appellant while acting as the auditor for the respondent in the preparation of the auditor's reports on the respondent for the financial years ending 31 May 1995, 31 May 1996 and 31 May 1997.

[6] On filing the writ of summons and the statement of claim the respondent proceeded to file a summons in chambers (encl 3) praying on ex-parte basis for several interim reliefs. The application was supported by an affidavit of one Koh Kim Chui affirmed on 9 January 1999.

[7] Upon hearing the ex-parte application on 9 March 1999 the learned High Court judge granted the several reliefs prayed for. In effect the main relief sought for was an *Anton Piller* order with consequential orders thereto.

[8] On 16 March 1999 the appellant filed encl 7 praying for an order to set aside the said Order while on 17 March 1999 the respondent filed encl 10 seeking for an order that it could continue to retain the documents seized pursuant to the said Order.

[9] Both applications were heard on 23 March 1999 by the same learned High Court judge who granted the said Order. And after hearing the parties he gave his judgment on 15 June 2001 in favour of the respondent herein.

[10] Dissatisfied with the said judgment, the appellant appealed to this court.

THE HIGH COURT JUDGMENT

[11] In dismissing encl 7 and allowing encl 10 the learned High Court judge premised his judgment on the following grounds, in summary:

(i) that he focused his judgment solely on the three grounds stated in encl 7;

(ii) that his decision on encl 7 would automatically answer encl 10;

(iii) that the first two grounds submitted by the appellant dealt with the failure by the respondent to make a full and frank disclosure during its ex-parte application, of facts pertaining to documents seized pursuant to the said Order in relation to another suit MT3–22–1203 of 1998 (otherwise known as the Lau's suit). However, since the respondent and the plaintiff in Lau's suit were distinct and separate entities (with even the appellant admitting such position when opposing another application by the respondent) the two suits should not be taken to be interrelated. Hence there was no duty upon the respondent to disclose what transpired in Lau's suit;

(iv) that there was no dispute that the appellant was in possession of the documents seized pursuant to the said Order and on the basis of paras 12 and 13 of the affidavit by Koh Kim Chui affirmed on 9 January 1999 the respondent was justifiably fearful that the appellant would alter, remove and/or destroy the documents seized;

(v) that based on the subsequent affidavits of Koh Kim Chui (encl 9) affirmed on 16 March 1999 and (encl 22) affirmed on 20 April 1999 instances of alteration, tempering and doctoring of the working papers were alleged which would require further elaboration; and

(vi) that based on the reasons for dismissing encl7 the counter-application by the respondent (encl10) would have to be allowed.

THE APPEALS

[12] In our oral judgment we expressed briefly our view that we were inclined to agree with the contentions of learned counsel for the appellant in that the grant of the said Order at the ex-parte stage, the contents of the said Order as well as its execution were unsatisfactory in that there were substantive and procedural non-compliance by the respondent with the guidelines and rules applicable whether statutory or under common law.

[13] And in determining the appeals before us we considered the arguments marshalled by learned counsel for the respective parties. The points raised may be categorised in two broad issues, namely,

(i) the nature of the Order executed; and

(ii) whether the learned High Court judge was justified in granting the said Order at the ex-parte stage bearing in mind the

preconditions required and the rules to be complied with, towit, the substantive and procedural requirements. Quite pertinent to this issue is whether there are guidelines applicable in Malaysia on the mandatory contents as well as in the execution of an *Anton Piller* order.

[14] However, before embarking on the substantive complaints of the appellant, we should briefly deal with the issue of whether the learned High Court judge was correct in his approach when he only dealt with the grounds as he found them in encl 7 and preferring to ignore any other grounds that could have been found in the supporting affidavit.

[15] With respect, we are of the view that the learned High Court judge had erred. There is nothing in law to preclude him from perusing the supporting affidavit in order to consider any other grounds advanced to justify the reliefs sought for in the application. In doing what he did, the learned High Court judge went over-board on technicalities without due consideration to the salutary notion that courts exist to do justice. This approach has now been given statutory recognition in this country by the amendment to the Rules of the High Court 1980 (see: O 1A) following the instructive comments made by the Federal Court in *Megat Naimuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd* [2002] 1 MLJ 385. Further, we have no hesitation to say that *UMW (Sarawak) Sdn Bhd v Kim Leong Timber Sdn Bhd & Ors* [1989] 3 MLJ 177 and *Bintulu Adhesive & Chemicals Sdn Bhd v Chuah Seah Joo Plywood (Sarawak) Sdn Bhd* [2000] MLJU 711 were rightly decided on this point.

[16] Now, on the first issue, having read the contents of the said Order we were not persuaded that it was only a mandatory injunction and that only prayer (b) of the said Order was executed. The contention was not supported by the materials before us and the events that took place subsequent to the granting of the said Order. There was no dispute that on 12 March 1999 the said Order was served and in effect executed by a representative of the respondent who came to the premises of the appellant. There was no invitation to the premises. This was not a case of where documents were given without the respondent having to come to the premises of the appellant. The respective affidavits of Koh Kim Chui affirmed on 16 March 1999 and Lee Noushi sworn to on 18 March 1999 both stated that the said Order was executed on 12 March 1999. Indeed it was only after being served with the said Order that a partner of the appellant offered to give copies of the documents being sought for. That offer was not acceptable to the representative of the respondent who was only prepared to accept the originals of those documents. In any event the giving of those documents was merely consequential to the execution of the said Order.

[17] Hence we find no merit in the submission of learned counsel for the respondent on this first issue.

[18] As for the second issue, the essence of the lengthy submission of learned counsel for the appellant is that the said Order should not have been given even at the ex-parte stage as the prerequisites were not satisfied. And when given, the said Order was defective in that its contents were not in accordance with the usual format and its execution was wrong in law in that there was no observance of any of the guidelines or safeguards that should have been incorporated therein.

[19] In response learned counsel for the respondent argued that although there were no guidelines stipulated in the said Order, in effect steps were taken to comply with them such as giving time to the appellant to seek legal advice and making copies of the documents seized for them to keep. The existence of any guidelines, particularly relating to the execution of an *Anton Piller* order, was also made an issue.

[20] We do not intend to deal with each and every issue raised before us. Suffice that we only address those issues which in our view are crucial in determining these appeals. But first we need to settle the question of whether there are guidelines or safeguards applicable in Malaysia in relation to *Anton Piller* order, particularly on its execution.

[21] An *Anton Piller* order is just another form of injunction albeit unique in its application. Hence, it is a discretionary relief. It assumed the name from the decision of the English Court of Appeal in *Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55; [1976] 1 All ER 779 (CA). This doctrine entered into our legal corpus through para 6 of the Schedule to the Court of Judicature Act 1964 in the same way as *mareva* injunction did. (See: *Zainal Abidin bin Haii Abdul Rahman v Century Hotel Sdn Bhd* [1982] 1 MLJ 260). And when adopting and applying this doctrine our courts at all levels have consistently ensured that the elements of the doctrine as enunciated by the English courts are complied with. (See *Lian Keow Sdn Bhd v C Paramiothi & Anor* [1982] 1 MLJ 217. *Aspatra Sdn Bhd v Bank Bumiputra Malaysia Bhd & Anor* [1987] 1 MLJ 97, *Makonka Electronic Sdn Bhd v Electrical Industry Workers' Union &Ors* [1997] MLJU 93 (HC)). There is therefore no question of adopting the doctrine less the necessary prerequisites to be satisfied before granting such a relief. In fact, this aspect of the doctrine is not contested by the respondent. What is being questioned is the applicability in this country of the requirements or guidelines housed in the English Practice Direction 1994 pertaining to the contents and execution of an *Anton Piller* order.

[22] It cannot be disputed that currently in Malaysia there is no Practice Direction issued ipsissima verba of the English Practice Direction 1994 or the Singapore Supreme Court Practice Direction No 1 of 1995. And such absence has triggered observations from some of our judges. (See *Larut Consolidated Bhd & Anor v Khoo Ee Bee & Ors* [1997] 5 MLJ 77.) Perhaps for the enhancement

of the applicability of the doctrine in this country the rules committee should seriously consider adopting the path taken by the other jurisdictions.

[23] Notwithstanding, it should not be assumed that in Malaysia a successful applicant for an *Anton Piller* order is at liberty to formulate his own contents and mode of execution of the order granted. That is because even before the issuance of the 1994 Practice Direction the English courts had embedded guidelines and safeguards when granting such relief. For instance, in the case of *Universal Thermosensors Ltd v. Hibben* [1992] 1 WLR 840 at p 860 Sir Donald Nicholls VC had this to say:

> *Anton Piller* orders
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> This case furnishes an illustration of both the virtues and vices of *Anton Piller* orders. The virtue was that the plaintiff was enabled to recover the item three list and the item four list and other documents, which, I strongly suspect, would never have seen the light of day if lessdraconiansteps,suchasanorder for delivery upof all documents containing confidential information regarding the plaintiffs customer contacts, had been the limit of the relief granted to the plaintiff. In all probability incriminating evidence of that nature would simply have been destroyed.
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> But this result was achieved at a very high price. As I have said, the defendants' claims arising out of the faulty execution of the *Anton Piller* order were disposed of by an agreement reached between the parties during the course of the trial. It would, therefore, be quite wrong for me to say anything which might be understood as criticism of the conduct of those, and in particular the solicitors, who were responsible for the execution of the *Anton Piller* order in this action. Nevertheless, from the undisputed facts which emerged before me certain lessons are to be learned. I draw attention to these points, in the hope that thereby these problems will not arise again. The *Anton Piller* procedure lends itself all too readily to abuse. This has been highlighted more than once: see the powerful judgments of Scott J in *Columbia Picture Industries Inc v Robinson* [1987] Ch 38 and of Hoffmann J in *Lock International Pic v Beswick* [1989] 1 WLR 1268. My impression is that these warning signals have been heeded, and that *Anton Piller* orders are, rightly, made much more sparingly than previously. But arising out of the history of what occurred in the present case, the following points may be noted.
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> (1) *Anton Piller* ordersnormally containatermthat before complying with the order the defendant may obtain legal advice, provided this is done forthwith. This is an important safeguard for defendants, not least because *Anton Piller* orders tend to be long and complicated, and many defendants cannot be expected to understand much of what they are told by the solicitor serving the order. But such a term, if it is to be of use, requires that in general *Anton Piller* orders should be permitted to be executed only on working days in office hours, when a solicitor can be expected to be available. In the present case Mrs Hibben was alone in her house, with her children in bed. She was brought to the door in her night attire at 7.15am, and told by a stranger knocking on the door that he had a court

order requiring her to permit him to enter, that she could take legal advice forthwith, but otherwise she was not permitted to speak to anyone else at all. But how could she get legal advice at that time in the morning? She rang her solicitor's office but, predictably, there was no response.

(2) There is a further feature of the situation to which I have just alluded which must never be allowed to occur again.If the order is to be executed at a private house, and it is at all likely that a woman may be in the house alone, the solicitor serving the order must be, or must be accompanied by, a woman. A woman should not be subjected to the alarm of being confronted without warning by a solitary strange man, with no recognisable means of identification, waving some unfamiliar papers and claiming an entitlement to enter her house and, what is more, telling her she is not allowed to get in touch with anyone (except a lawyer) about what is happening.

(3) In the present case a dispute arose about which documents were taken away, and from which of the premises visited. Understandably, those who execute these orders are concerned to search and seize and then get away as quickly as possible so as to minimise the risk of confrontation and physical violence. Nevertheless, in general *Anton Piller* orders should expressly provide that, unless this is seriously impracticable, a detailed list of the items being removed should be prepared at the premises before they are removed, and that the defendant should be given an opportunity to check this list at the time.

(4) *Anton Piller* orders frequently contain an injunction restraining those on whom they are served from informing others of the existence of the order for a limited period. This is to prevent one defendant from alerting others to what is happening. There is an exception for communication with a lawyer for the purpose of seeking legal advice. In the present case that injunction was expressed to last for a whole week. That is far too long. I suspect something went awry with the drafting of the order in this case.

(5) In the present case there was no officer or employee of TPL or Emco present when their offices and workshops were searched and documents and components taken away. This is intolerable. Orders should provide that, unless there is good reason for doing otherwise, the order should not be executed at business premises save in the presence of a responsible officer or representative of the company or trader in question.

(6) The making of an *Anton Piller* order in this case can be seen to be justified by what was discovered. But it is important not to lose sight of the fact that one thing which happened was that Mr James carried out a thorough search of all the documents of a competitor company. This is most unsatisfactory. When *Anton Piller* orders

A are made in this type of case consideration should be given to devising some means, appropriate to the facts of the case, by which this situation can be avoided.

(7) *Anton Piller* orders invariably provide for service to be effected by a solicitor. The court relies heavily on the solicitor, as an officer of the court, to see that the order is properly executed. Unhappily, the history in the present case, and what has happened in other cases, show that this safeguard is inadequate. The solicitor may be young and have little or no experience of *Anton Piller* orders. Frequently he is the solicitor acting for the plaintiff in the action, and however diligent and fair minded he may be, he is not the right person to be given a task which to some extent involves protecting the interests of the defendant. I think there is force in some of the criticisms set out in the invaluable article by Professor Dockray and Mr Hugh Laddie QC on '*Piller Problems*' (1990) 106 LQR 601. It seems to me that the way ahead here, pursuing one of the suggestions made in that article, is that when making *Anton Piller* orders judges should give serious consideration to the desirability of providing, by suitable undertakings and otherwise: (a) that the order should be served, and its execution should be supervised, by a solicitor other than a member of the firm of solicitors acting far the plaintiff in the action; (b) that he or she should be an experienced solicitor having some familiarity with the workings of *Anton Piller* orders, and with judicial observations on this subject (eg, as summarised in the notes in The Supreme Court Practice 1991 to RSC, O 29, r 3); (c) that the solicitor should prepare a written report on what occurred when the order was executed; (d) that a copy of the report should be served on the defendants; and (e) that in any event and within the next few days the plaintiff must return to the court and present that report at an inter panes hearing, preferably to the judge who made the order. As to (b), I can see advantages in the plaintiff being required to include in his evidence, put to the judge in support of his application for an *Anton Piller* order, details of the name of the solicitor and of his experience.

Of course this procedure would add considerably to the cost of executing an *Anton Piller* order. The plaintiff would have to be responsible for paying the fees of the solicitor in question, without prejudice to a decision by the court on whether ultimately those costs should be borne in whole or in part by the defendant. But it must be appreciated, and certainly it is my view, that in suitable and strictly limited cases, *Anton Piller* orders furnish courts with a valuable aid in their efforts to do justice between two parties. Especially is this so in blatant cases of fraud. It is important therefore that these orders should not be allowed to fall into disrepute. If further steps are necessary to prevent this happening, they should be taken. Ifplaintiffs wish to take advantage of this truly draconian type of order, they must be prepared to pay for the safeguards experience has shown are necessary if the interests of defendants are fairly to be protected.

[24] The court of our neighbouring country, Singapore, also took a similar position even before the introduction of the 1995 Practice Direction as reflected in the case of *Computerland Corp v Yew Seng Computers Pte Ltd* [1991] 3 MLJ 201 (also [1991] SLR 247) when Thean J said at p 205:

> More recently, in *Columbia Picture Industries Inc & Ors v Robinson & Ors* [1987] Ch 38; [1986] 3 All ER 338, Scott J demonstrated in very vivid terms the serious practical effects and far-reaching consequences produced by an *Anton Piller* order. He said at pp 72–73:
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> > But notice the position that *Anton Piller* procedure, and its logical consequences, produces: a mandatory order is made in the absence of the respondent and in secret; it is served upon and executed against the respondent without his having any chance to challenge the correctness of its grant or to challenge the evidence on which it was granted.
> >
> > Now let the possible and, perhaps, probable effects of an *Anton Piller* order be considered. The order is served and executed. If the order is in the terms of the order in the present case and is executed as it was in the present case, there will be a wholesale removal of all business material, whether stock-in-trade, bank statements, cheque books or correspondence. The continuance of the business by the respondent to the order is thereby made impossible. How can a business be continued without records? How can it be continued without stock-in-trade? It will be recalled that, in the present case, the order authorised the removal of, *inter alia*, the video recorders at 8 Frederick Street. They were not, in the event, removed but, if they had been, the whole of Mr Robinson's copying business would for that reason alone have been closed down. It is customary, on account of the *mareva* injunction accompanying *Anton Piller* orders, for a copy of the order to be served on the respondent's bankers. That was done in the present case. The almost certain effect of that being done will be that the bankers will decline to allow any further credit to the respondent. The order will throw such a question mark over the business of the respondent as to make any other course commercially imprudent and, therefore, unlikely. In the present case, Barclays Bank, upon service of the order, refused to allow the defendants any further credit.
> >
> > The service and execution of an *Anton Piller* order is likely to have on a respondent a personal as well as a commercial effect. *Anton Piller* orders are often granted not simply in respect of business premises but in respect of the respondent's home. He is required, on pain of committal, to open the doors of his house to the plaintiffs' representatives and to permit a search of the contents thereof. The plaintiffs and their representatives are at liberty to search and rummage through the personal belongings of any occupant of the house and to remove the material they consider to be covered by the terms of the order. The traumatic effect and the sense of outrage likely to be produced by an invasion of home territory in the execution of an *Anton Piller* order is obvious.
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> Later, he said at p 76:
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> > But a decision whether or not an *Anton Piller* order should be granted requires a balance to be struck between the plaintiff's need that the remedies allowed by

A the civil law for the breach of his rights should be attainable and the requirement of justice that a defendant should not be deprived of his property without being heard. What I have heard in the present case has disposed me to think that the practice of the court has allowed the balance to swing much too far in favour of plaintiffs and that *Anton Piller* orders have been too readily granted and with insufficient safeguards for respondents.

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We respectfully agree with the observations made by these two judges. It is also our experience that in Singapore too free a use has been made by plaintiffs of the *Anton Piller* orders, and all too often such orders have been applied for without sufficient grounds and on a bare allegation, without any evidence in support, that there was a fear or likelihood that material evidence would be destroyed or removed or made to disappear by the defendants. Our court has also, on some occasions, responded favourably to such applications and, in the words of Scott J, has allowed the balance to swing in favour of the plaintiffs. It is therefore imperative that on every application for an *Anton Piller* order the party seeking it must satisfy the stringent requirements laid down in the *Anton Piller* case and the court must scrutinize with care the evidence produced and must, in the words of Browne-Wilkinson J, be very circumspect in granting such an order.

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[25] In turn, our courts when accepting the doctrine had in fact ensured that such guidelines and safeguards incorporated in those highly persuasive decisions were followed. That is plain common sense. Otherwise it would be like arming an applicant with 'one of the law's two 'nuclear' weapons' per Donaldson LJ (as he then was) in *Bank Mellat v Nikpour* [1985] FSR 87 at p 90 to be used at his whims and fancies. Thus, we are entirely in agreement with the observation of the learned judge in the case of *Makonka Electronic Sdn Bhd v Electrical Industry Workers' Union & Ors* when he said:

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It is a draconian order, granted by the court upon the balance of undertakings by the applicant and upon specific terms and conditions. Those terms, conditions and undertakings cannot be ignored or left for subsequent compliance at will. Compliance with the terms of the conditions and undertakings are necessary pre-conditions to the enforcement of the order…

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The *Anton Piller* order is a valuable procedure and ought to be preserved. The efficacy, however, of the *Anton Piller* procedure depends very much on all the parties seeking a fine balance to protect their respective interests and rights. A solicitor acting for an applicant must remember at all times that he is an officer of the court, and to ensure that the application he is putting forward contains adequate safeguards of the basic rights of the other party. It is not that he is obliged to act for the other party, but that he is bound to ensure the procedure is not abused. He must put forward a reasonable application if it is to be entertained. He should for example ensure:

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1 That there is full and frank disclosure of all relevant information and evidence to justify the issue of the order.

2 The order must be drawn such that it extends no further than the minimum necessary to achieve the preservation of evidence which may be otherwise removed or destroyed.

3 The application includes first alternative prayers for orders to produce and deliver specific evidence. Only upon the respondents' failure to produce and deliver such evidence would the other orders of the *Anton Piller* order are to come into effect. This would offer a 'less draconian unless necessary' approach, and by specifying the evidence to be produced avoid fishing expeditions and unnecessary invasion into unrelated information.

4 That the application contains clear and specific undertakings that the order will be served by a solicitor who will at the same time supply a copy of the application and all affidavits and documents put before the judge in making the application; explain its exact terms to the respondent; advise him to seek immediate legal advice and that he has a reasonable time to do so.

5 That the application contains clear undertakings for damages, and that the evidence obtained will not be used in any other proceedings without the consent of the court.

6 As a further safeguard, to have a separate solicitor to supervise the execution by the applicants' solicitors, and persons who are to accompany him are to be named in the order so that they may be identified by the respondent (see *Vapormatic Co Ltd v Sparex Ltd* [1976] 1 WLR 939).

The purpose of the safeguards is to ensure that the enforcement of the order could be carried out in a peaceful and orderly manner. For that purpose the order must be carried out strictly on its terms and the undertakings thereunder. *Where there has been non-compliance, the order has become liable to set aside and such non-compliance cannot be corrected by subsequent compliance*. Such a strict approach is necessary to guarantee that *Anton Piller* orders are carried out strictly according to its terms and no further. For this reason the order was subsequently set aside upon application of the respondent, and cannot be the basis of an application for leave to commence committal proceedings against the respondent. (Emphasis added.)

[26] Hence, in this country even with the absence of any Practice Direction the application and execution of an *Anton Piller* order is subject to stringent requirements, guidelines and safeguards. In other words any departure would be contrary to the common law of Malaysia as such point has already been well established. We therefore rejected the contention of learned counsel for the respondent.

[27] Reverting now to the second issue, we examine first whether there was any substantive non-compliance as alleged by the appellant. We take the reverse approach, that is, to first consider the contents and the execution of the said Order. We will deal with the prerequisite elements later.

[28] On perusal of the said Order we found obvious omission to incorporate any undertakings and safeguards that should be stipulated in an *Anton Piller* order. It is also not in dispute that it was the solicitor for the respondent who came to the premises of the appellant armed with the said Order. At the material time no independent solicitor was present to supervise its execution. There is also no record to indicate that the appellant was informed of its right to legal advice before the execution was carried out. In fact we would say that there was hardly any compliance with any of the guidelines as stipulated in the decisions of our courts and now part of our common law. The only excuse rendered by the respondent was that it was only executing a mandatory injunction. We have debunked that argument.

[29] Hence, there was a total failure by the respondent to observe the minimum requirements as to the contents and the execution of the said Order which elements the learned High Court judge failed to address. On this ground alone that we had no hesitation to set aside the said Order which we did. There is no question of exercise of discretion here. And that should effectively settle encl 7 and the related appeal.

[30] But having heard the arguments, we deem it desirable to at least briefly address the other aspect of the substantive non-compliance issue raised by the appellant, namely, on the assertion that the respondent at the ex-parte stage failed to satisfy the prerequisite elements for the grant of an *Anton Piller* order.

[31] It is settled that the basic requirements to be satisfied by an applicant for an *Anton Piller* order at an ex parte stage are as follows:

(a) to disclose an extremely strong *prima facie* case,

(b) that a refusal to grant the order will have a very serious effect to the applicant,

(c) that it must be established that the defendant has in its possession the relevant documentsand/or materials being sought for and that there is a real possibility that the defendant may destroy such documents and/or materials,

(d) that the applicant is required to make a full and frank disclosure, and

(e) that the order should contain the necessary undertakings and safeguards to be complied with upon its execution.

[32] We have already dealt with item (e). As for the other items we do not think we should address each one of them. Suffice that we only examine those that we think are critical. It is in the forefront of our minds that, as in any other types of injunction, the grant or refusal of an *Anton Piller* order is a

matter of discretion. And when such discretion is properly and judiciously exercised there can hardly be any justification for an appellate court to intervene.

[33] It was the submission of learned counsel for the appellant that overall the application was premised on baseless speculations and hearsay. He contended that reliance by the learned High Court judge on paras 12 and 13 of encl 2 was misconceived in that nowhere the deponent had averred that he had sight of the 'working papers, notes and documents' in possession of the appellant in stark contrast to the position in *Yousif v Salama* [1980] 3 All ER 405 which the learned High Court judge relied on as the authority for his decision. It was also pointed out to us that in any event *Yousif*'s case could not be a strong authority to follow being only a majority decision with strong dissenting judgment and having been criticised in subsequent cases.

[34] We think there is merit in the argument. The present case is factually different from *Yousif*'s case. In the first place there was no assertion from any of the deponents of the affidavits filed for the respondent that the documents were seen in the possession of the appellant. In *Yousif*'s case the plaintiff visited the defendants' office where he saw the accounts showing the amount of commission due to him. The plaintiff then issued a writ claiming the amount owed and, fearing that the defendants might destroy the two files containing the accounts and a diary which contained details of the transactions, applied for and was granted by the majority in the English Court of Appeal an *Anton Piller* order permitting him to enter the defendants' premises to search and locate the files and diary and remove them to the custody of his solicitor. But as pointed out by learned counsel even this decision is not without criticisms. For one, there is the strong dissenting view of Donaldson LJ that on the facts of the case it would have been more appropriate for the plaintiff to seek for an account with the usual inquiries or for discovery instead of an *Anton Piller* order. Similar negative view was also expressed in the case of *Computerland Corp v Yew Seng Computers Pte Ltd*.

[35] Thus in our opinion and with respect it was quite erroneous for the learned High Court judge in the present case to conclude that *Yousif*'s case substantively supported him in the exercise of his discretion.

[36] The respondent also failed to address another factor at the ex-parte stage, namely, on the serious consequence to it if its application was refused.

[37] We agree with the contention of learned counsel for the appellant that there is nothing in the supporting affidavit or in any of the other affidavits filed on behalf of the respondent which expressed such apprehension.

[38] Another assertion of the appellant was that the respondent failed to make a full and frank disclosure of all material facts known to it at the ex- parte stage. Specific reference was made to the failure by the respondent to inform

the learned High Court judge of the existence of a discovery order in relation to Lau's suit. It was contended that although the parties were different the subject matter and dispute were related or connected to the present case and thus should have been disclosed.

[39] In *Siporex Trade SA v Condel Commodities Ltd* [1986] 2 ILR 428 Bingham J (as he then was) said this at p 437:

> The scope of the duty of disclosure of a party applying ex parte for injunctive relief is, in broad terms, agreed between the parties. Such an applicant must show the utmost good faith and disclose his case fully and fairly. He must, for the protection and information of the defendant, summarise his case and the evidence in support of it by an affidavit sworn before or immediately after the application. *He must identify the crucial points for and against the application, and not rely on general statements and the mere exhibiting of numerous documents. He must investigate the nature of the cause of action asserted and the facts relied on before applying and identify any likely defences. He must disclose all facts which reasonably could or would be taken into account by the judge in deciding whether to grant the application*. It is no excuse for an applicant to say that he was not aware of the importance of matters he has omitted to state. *If the duty of full and fair disclosure is not observed thw court may discharge the injunction even if after full enquiry the view is taken that the order made was just and convenient and would probably have been made even if there had been full disclosure.* (Emphasis added.)

[40] As expressed by the English courts it is also the law in this country that when applying for an ex-parte order an applicant is duty-bound to make an honest, full and frank disclosure of all relevant material facts within his knowledge, which failure may be a ground to set aside any order granted. (See: *President Hotel Sdn Bhd v Dato Bandar Kuala Lumpur & Anor* (75) MD 1, *Bakmawar Sdn Bhd v Malayan Banking Bhd* [1992] 1 MLJ 67, *Makonka Electronic Sdn Bhd v Electrical Industry Workers' Union & Ors*.

[41] We note that the purported reason given by the respondent for not disclosing the existence of the discovery order was because the parties involved were different. It is not in dispute that Lau's suit was commenced by an individual. And in agreeing with the respondent and ruling that Lau's suit was irrelevant the learned High Court judge also took into account the different solicitors handling these cases. But with respect, we are of the view that such approach is too simplistic. As pointed out by learned counsel for the appellant the answer lies in para 9 of encl 9 where Koh Kim Chui affirmed on 16 March 1999 thus:

> I would respectfully say that the alterations which were done by the first defendants was for the purpose of concocting a defence for themselves in Civil Suit MT3–22–l203 of 1998 before this Honourable Court. I am informed that the first defendant is the defendant in Civil Suit No MT3–22–1203 of 1998 and the issues raised therein pertains directly to the documents taken pursuant to the *Anton Piller* order.

[42] Hence, we would say that the failure to disclose the existence of the discovery order arising from Lau's suit would tantamount to a failure to make a full and frank disclosure of a relevant material fact at the ex-parte stage. While generally such failure would be a ground to set aside any ex-parte order granted, it is not so in all cases. It depends on the facts and circumstances of each case. (See: *Tan Guan Eng & Anor v Ng Kweng Hee & Ors* [1992] 1 MLJ 487 following the view expressed by Sir Nicolas Browne-Wilkinson VC in *Dormeuil Freres SA & Anor v Nicolian International (Textiles) Ltd* [1988] 3 All ER 197; [1988] 1 WLR 1362).

[43] In the appeals before us such failure was not the only deficiency of the application in term of the essential elements required to be satisfied at the exparte stage. We have already given our views on the others. Thus in our judgment this deficiency provided another ground to rule that the said Order should not be sustained. No doubt the grant was an exercise of discretion, but it has been shown to our satisfaction that such exercise was unjustified, premised on wrong principles and was unjust in the circumstances. Accordingly as an appellate court, it behoves upon us to set things right and to intervene as we did. (See *Evans v Bartlam* [1937] AC 473; *Ratnam v Cumarasamv & Anor* [1965] 1 MLJ 228).

[44] The other thrust in the submissions of learned counsel for the appellant was on procedural non-compliance at the ex parte stage, specifically with O 29 of the Rules of the High Court 1980 ('RHC').

[45] Learned counsel for the appellant gave a litany of procedural non-compliance with the provisions of O 29 of the RHC by the respondent. These may be summarised thus:

(a) there was a failure to comply with O 29 r 1(2A)(a), (b), (c), (d), (e), (f) and (g) of the RHC; and

(b) there was non-compliance with O 29 r 1(2) of the RHC in that the nature of the urgency of the application was not shown or stated.

[46] On perusal of the application (encl 3) and the supporting affidavit of Koh Kim Chui affirmed on 9 January 1999 (encl 2) we noted, *inter alia*, that there was nothing stated therein to indicate that the appellant was given notice of the intended application or the reason for not doing so. Understandably, the application was for an *Anton Piller* order in which the elements of secrecy and speed are essential. But surely an explanation to that effect could have been given in the affidavit. It was also not included in the affidavit any answer given by the appellant, or which was thought likely to be asserted by it, either to the claim in the action or to the claim for interlocutory relief. Further, there was no clear and concise statement of facts stated which gave rise to the claim

and the interlocutory relief sought for nor was there a clear and concise statement of the relief sought. A clear and concise statement of any fact known to the respondent which might lead the court not to grant the Order sought ex parte or the absence of such fact was also not stated. Thus, we agree with the learned counsel for the appellant that the respondent had failed to satisfy the prerequisites of O 29 r (1)(2A) of the RHC.

[47] Another obvious omission in the application and the supporting affidavit was a statement or reason as to the nature of the urgency thereby justifying the application to be made ex parte. There was no explanation given for the gap of about one month between the affirmation of the affidavit in support and the actual filing of the application. The time gap, in our view, did not indicate any urgency in the matter. Indeed the respondent could not for that reason be heard to say subsequently that the matter was urgent.

[48] Accordingly, we were and are satisfied that there was a blatant failure to observe the provisions of O 29 of the RHC which left this court with no choice but to set aside the said Order. In coming to our conclusion we were reminded of the decision of this court in *Motor Sports International Ltd (Servants or Agents at Federal Territory of Labuan) & Ors v Delcont (M) Sdn Bhd* [1996] 2 MLJ 605 where Gopal Sri Ram JCA in his judgment said this at p 490:

> The provisions of O 29 r 2A were introduced by amendment in order to ensure that ex parte injunctions of any sort were not granted willy-nilly, but only in cases where they were truly called for. In order to ensure that the policy behind the introduction of r 2A is not defeated, High Courts must demand strict compliance with its terms. More so, when the relief applied for is in the nature of a *mareva* or an *Anton Piller* type of injunction because of the incalculable harm and damage that may be caused to a defendant by the grant of either of these orders.
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> Having perused the affidavit in question, we find that there has not been even a feeble attempt to meet the requirements of r 2A, especially sub-para (d) thereof. On this ground alone, the ex pane injunction ought to have been dissolved by the learned judge.

(See *HMO Pacific Sdn Bhd v Dr Johari b Muhamad Yusup* [1997] MLJU 286).

[49] We did also consider the other points raised by both parties. But our views on them would not alter our conclusions hereinabove. In the event and for the reasons aforesaid we allowed the appeal against the decision of the learned High Court judge in respect of encl 7 and set aside the said Order.

[50] In view of our decision in respect of encl 7 it was inevitable that we should and did also allow the appeal against the decision of the learned High Court judge on encl 10.

[51] Having allowed both the appeals by the appellant we further ordered that the respondent pay to the appellant damages to be assessed by Registrar of the High Court. We also ordered that costs for these appeals to be taxed and paid to the appellant and the deposit paid be refunded.

Appeals allowed.

Reported by Izzaty Izzuddin